

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

M&S ADVISORY GROUP, INC.	:	Case No. C-1-02-522
Plaintiff,	:	<u>PLAINTIFF'S MEMORANDUM IN</u>
v.	:	<u>OPPOSITION TO DEFENDANT'S</u>
EYEMART EXPRESS, LTD.,	:	<u>MOTION TO CONTINUE THE</u>
Defendant.	:	<u>TRIAL</u>
	:	Judge Spiegel
	:	Magistrate Judge Hogan

Defendant EyeMart Express, Ltd. ("EyeMart") has moved this Court to continue the trial date of September 7, 2004 in this action. EyeMart requests that the date only be continued for approximately 60 days. Prior to filing its motion, EyeMart's counsel sought the agreement of M&S Advisory Group, Inc.'s ("M&S") counsel to such a continuance. While the undersigned counsel routinely agrees to such requests, he objected in this instance because such a continuance is unwarranted and would be prejudicial to M&S.

First, it must be noted that the trial date was selected during a scheduling conference on September 17, 2003 at which all counsel were present. The date was selected by agreement of counsel. It was selected approximately one year in advance so that there would be no conflicts on anyone's schedule. In fact, as counsel for EyeMart has acknowledged, these "conflicts" have only recently arisen. Moreover, the date was a continuance of the original trial date of January 12, 2004. This continuance was required by EyeMart's request, late in the case, to amend its counterclaim. M&S agreed to that amendment at the time despite the need for a continuance which it necessitated.

M&S's principal and sole consultant, Martin Sherman, will turn 75 years old this month. Mr. Sherman has been patiently waiting for his day in court and will not agree to a further postponement. While community service and personal obligations arise, they should not be allowed to take precedence over a trial that was scheduled a year in advance.

M&S has been cooperative in all the scheduling changes, for the case schedule, depositions, etc., previously requested by EyeMart. Nonetheless, M&S must object to this latest attempt to delay the ultimate decision in this matter. There has been a pattern of action by EyeMart to delay the trial of this action. This lawsuit was filed on June 13, 2002. When the case was first filed, EyeMart asserted that the Court was without jurisdiction to hear the matter. This, despite the fact that EyeMart initiated contact with M&S in this case by its own agent who was based in this state. Not only did this Court find that there was specific jurisdiction for this action, it ruled that EyeMart's activities in this state subjected it to general jurisdiction. This jurisdictional tussling meant that the case was pending for seven months before the simple issue of scheduling could take place.

After this initial delay, in March 2003, EyeMart then sought to assert a counterclaim after having answered the lawsuit. Several months later, EyeMart sought to amend that counterclaim. That amendment necessitated a continuance of the original trial date. While M&S does not doubt that EyeMart's counsel now finds himself with conflicts in the schedule, this circumstance can only benefit his client who has sought every opportunity to delay this action.

Finally, given the Court's calendar and the other cases on this Court's docket, it is likely not possible to obtain the sort of short continuance sought by counsel for EyeMart. So, any continuance will mean that the determination of this action will be delayed even further. In order to accommodate the scheduling issues raised by counsel, M&S has offered to accelerate the trial date, assuming the Court could accommodate the parties, and try the case in August. Other than such an accommodation, M&S objects to the further delay of its efforts to seek justice from this Court.

Based on the foregoing, M&S requests that the Court deny EyeMart's request to further delay the trial in this action.

/s/ Robert A. Pitcairn, Jr.  
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 5, 2004, I electronically filed the foregoing Defendant EyeMart Express Ltd.'s Motion to Move the Trial with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Michael W. Hawkins and Jon B. Allison, Trial Attorneys for Defendant, Dinsmore & Shohl, 255 E. Fifth Street, Suite 1900, Cincinnati, Ohio 45202.

/s/ Robert A. Pitcairn, Jr.  
Robert A. Pitcairn, Jr.

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